

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications)
and Energy to establish a surcharge to recover prudently)
incurred costs associated with the provision of wireline)
Enhanced 911 services, relay services for TDD/TTY users,)
communications equipment distribution for people with)
disabilities, and amplified handsets at pay telephones.)

D.T.E. 03-63

**VERIZON MASSACHUSETTS’
MOTION FOR CONFIDENTIAL TREATMENT**

Verizon Massachusetts (“Verizon MA”) hereby requests that the Department grant this Motion to provide confidential treatment of the competitive bids received by Verizon MA in response to its Request for Proposal (“RFP”) to conduct an independent audit of the Company’s residence directory assistance revenues and enhanced 911/disability access costs. Verizon MA also requests confidential treatment of its recommendation regarding the selection of the independent auditor. As shown below, that data qualifies as a “trade secret” or “confidential, competitively sensitive, proprietary information” under Massachusetts law and, therefore, is entitled to protection from public disclosure in this proceeding. Such confidential treatment is also consistent with the nature of the competitive bidding process.

ARGUMENT

Section 5 of Massachusetts General Laws Chapter 25 provides that “[t]he Department may protect from public disclosure trade secrets, confidential, competitively

sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter.”

In determining whether certain information qualifies as a “trade secret,”¹ Massachusetts courts have considered the following:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the employer to guard the secrecy of the information;
- (4) the value of the information to the employer and its competitors;
- (5) the amount of effort or money expended by the employer in developing the information; and
- (6) the ease of difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972). The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has “the right to keep the work which it had done, or paid for doing, to itself.” Similarly, courts in other jurisdictions have found that “[a]

¹ Under Massachusetts law, a trade secret is “anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement.” Mass. General Laws c. 266, § 30; *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court (“SJC”), quoting from the Restatement of Torts, § 757, has further stated that “[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors ... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers.” *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc.*, 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that “a

trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

In this Motion, Verizon MA seeks to protect the confidentiality of bids submitted by four competing firms in response to the RFP approved by the Department in this proceeding. In accordance with that RFP, each bid contains detailed information relating to the firm's work plans, methods and procedures,² qualifications, and pricing and fees to conduct an independent audit of Verizon MA's residence directory assistance revenues and enhanced 911/disability access costs. Verizon MA has reviewed those bids and provided the Department with its recommended auditor, as required by the RFP. Verizon MA, therefore, requests that the Department afford the Company's recommendation the same confidential treatment as the underlying data on which it is based.

Confidential treatment of the bid data in this proceeding is reasonable and appropriate given the competitive nature of the bid process. It is also warranted to ensure that Verizon MA obtains the best value for its RFP. If bids are publicly disclosed, and

trade secret need not be a patentable invention." *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

² It should be noted that the Department has afforded proprietary treatment to Verizon MA's methods and procedures ("M&Ps") in other proceedings. *See e.g.*, D.T.E. 99-42/43/52, *MediaOne and Greater Media Arbitration* (in which the Department ruled that internal Company M&Ps for implementing local number portability were proprietary); *see also* D.T.E. 98-59, *Complaint of Tel-Save* (in which the Department ruled that internal Company M&Ps for implementing intraLATA presubscription were proprietary). There is no reasonable basis for treating potential bidders' M&Ps any differently for confidentiality purposes.

bidders are allowed access to one another's proposals, this could adversely affect the competitive bid process, thereby resulting in less advantageous terms or higher costs for Verizon MA for the work to be performed. It may also discourage some bid submissions, thereby reducing Verizon MA's options.

The Department has addressed the confidentiality of bid information and supplier agreements in various proceedings. In D.T.E. 99-81 (*Re. Petition of The Berkshire Gas Company*), the Department found that "protective treatment of such competitively sensitive information is appropriate because disclosure may affect future negotiations by either constraining the willingness of managers to offer better or more innovative terms, or limit the bargaining ability of the Companies." *Order* at 9 (1999). Likewise, the Department ruled in D.T.E. 96-18 that all cost and pricing information from potential suppliers should be redacted from the public record. *Order* at 3-4 (1996). *See also* D.T.E. 98-121 *Order* at 4 (1999) (in which the Department maintained the standards of confidentiality between Fitchburg Electric and Gas Company and the bidders and allowed the confidential treatment of bid information). The Department should reach a similar conclusion in this proceeding.

To make the four audit proposals publicly available would compromise the integrity of the bid process and undermine Verizon MA's bargaining position in current and future RFP situations. No compelling need exists for divulging competitive bids to the public or other parties to this proceeding. Verizon MA's interest in preserving the confidentiality of that bid data far outweighs any interest in public disclosure, which would only serve to provide unbridled access to competitively sensitive information provided by potential suppliers by placing it in the public domain. Therefore, it is both

prudent and permissible under Massachusetts law to afford such documents confidential treatment.

WHEREFORE, for the foregoing reasons, Verizon MA respectfully requests that the Department grant this Motion.

Respectfully submitted,

VERIZON MASSACHUSETTS

Its Attorney,

Barbara Anne Sousa
185 Franklin Street, 13th Floor
Boston, Massachusetts 02110-1585
(617) 743-7331

Dated: February 12, 2004